LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUN 3 1971
E. ROBERT SEAVER, CLERK

No. ~~1784~~

70-240

In the

Supreme Court of the United States

OCTOBER TERM, 1970

PVT. E2 DONALD JACK ANDERSON NG26382581,
Petitioner,

vs.

MELVIN LAIRD, Secretary of Defense, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

GEORGE C. PONTIKES
11 South LaSalle Street
Chicago, Illinois 60603
Attorney for Petitioner

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

	PAGE
Citation to the Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provision Involved	2
Statutes Involved	3
Army Regulations Involved	3
Statement of the Case	3
Reasons for Granting the Writ	6
Conclusion	14
Appendices:	
1—Opinion of the U. S. Court of Appeals	1a
2—Judgment of the U. S. Court of Appeals	11a
3—Army Regulations Involved	12a

List Of Authorities Cited

Cases:	
Bates v. Little Rock, 361 U.S. 516, at 524 (1960)	10
Braxton v. Board of Public Instruction of DuVal County, Fla., 303 F. Supp. 958 (1969)	6
Breen v. Kahl, 491 F. 2d 1034 (7th Cir., 1969)	7, 8
Burns v. Wilson, 346 U.S. 137 (1953)	9
Crews v. Clones, 432 F. 2d 1259 (CA, 7, 1970)	7, 8
Goldman v. Knecht, 295 F. Supp. 897 (1969)	12
Griswold v. Connecticut, 381 U.S. 479, 85 Sup. Ct. 1687	6

PAGE

Gregory v. City of Chicago, 394 U.S. 111, 89 S. Ct. (1969) 6

Leslie Tobin Imports, Inc. v. Rizzo, 305 F. Supp. 1135 (1969) 6

Musser v. Utah, 333 U.S. 95, 68 Sup. Ct. 397 (1948) 12

Orloff v. Willoughby, 345 U.S. 83 (1953) 9

Perkins v. State of North Carolina, 234 F. Supp. 333 (1964) 12

Roberts v. Clement, 252 F. Supp. 835 (1966) 12

Street v. New York, 394 U.S. 576, 89 S. Ct. 1354 (1969) 6

Stromberg v. California, 51 Sup. Ct. 532, 283 U.S. 359 (1931) 6

Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 89 S. Ct. 733 (1969) .. 6

STATUTES:

10 U.S.C., 673 a 3, 12

28 U.S.C., 1254 (1) 2

ARMY REGULATIONS:

Army Regulation 600-20 .....2, 3, 8, 9, 10, 11, 13

Army Regulation 135-91-5d(2) 2, 3, 8, 9, 10, 13

UNITED STATES CONSTITUTION:

Amendment I to the United States Constitution 2, 6, 7, 9

Amendment V to the United States Constitution .. 2

Amendment IX to the United States Constitution 3, 6, 7, 9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No.

PVT. E2 DONALD JACK ANDERSON NG26382581,
Petitioner,

vs.

MELVIN LAIRD, Secretary of Defense, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Pvt. E2 Donald Jack Anderson, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Seventh Circuit entered on January 14, 1971, in the above entitled cause.

CITATION TO THE OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit, printed in Appendix attached hereto, *infra,* pages 1a-10a, is reported at 437 F. 2d 912.

JURISDICTION.

The opinion and judgment of the Court of Appeals were filed and entered on January 14, 1971. On April 20, 1971, an Order was entered extending time to file the Petition for Writ of Certiorari to and including May 14, 1971. On May 18, 1971, another Order was entered extending time to file the Petition for Writ of Certiorari to and including May 29, 1971. This Petition for Writ of Certiorari will be timely filed on or before May 29, 1971.

The Jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED.

1. Has Petitioner been denied his Constitutional rights to freedom of expression or personal liberty guaranteed by the First and Ninth Amendments to the United States Constitution?

2. Are Army Regulations 135-91-5d(2) and 600-20 so vague and uncertain so as to violate due process?

CONSTITIONAL PROVISION INVOLVED.

Amendment I to the United States Constitution provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

Amendment V to the United States Constitution provides in pertinent part:

> "No person shall . . . be deprived of life, liberty or property, without due process of law; . . ."

Amendment IX to the United States Constitution provides in pertinent part:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

STATUTES INVOLVED.

10. U.S.C., Section 673a(a)(1) provides in material part as follows:

> "Ready Reserve: members not assigned to, or participating satisfactorily in, units
>
> "(a) Notwithstanding any other provision of law, the President may order to active duty any member of the Ready Reserve of an armed force who—
>
> "(1) is not assigned to, or participating satisfactorily in, a unit of the Ready Reserve. . . ."

ARMY REGULATIONS INVOLVED.

Army Regulation 135-91-5(d)(2); Army Regulation 600-20, paragraph 31a(2) (April 1968); Army Regulation 600-20, paragraph 31a(2) (as amended November 28, 1969); Army Regulation 600-20, paragraph 31a(2) (as amended May 28, 1970); the pertinent texts of which are hereafter set forth in the Appendix hereto, page 12a.

STATEMENT OF THE CASE.

On July 10, 1970, a verified complaint in this matter was filed in the Federal District Court for the Northern District of Illinois, Eastern Division. The complaint sought an Order in the nature of mandamus directing the Respondents, Melvin Laird, Secretary of Defense, Stanley Resor, Secretary of the Army, and V. P. Mock, Commanding General of Fifth U.S. Army, from ordering the petitioner involuntarily into active duty in the United States

Army; such injunction to remain in effect until petitioner's order to involuntary active duty was rescinded and he was reinstated as a member in good standing of the Illinois Army National Guard. Further, the complaint sought a temporary restraining order or preliminary injunction enjoining the aforesaid Respondents, Laird, Resor and Mock, from ordering the petitioner into involuntary active duty in the Armed Forces until the issues in the case were determined. (A. 2a)[1]

On July 10, 1970, petitioner moved for a preliminary injunction before the District Court below seeking the aforesaid injunction until the issues in the cause were determined. The District Court below heard the argument of both counsel and at the conclusion, the Court denied the motion for a preliminary injunction. Petitioner thereupon made a motion for a stay of the order for involuntary active service pending the appeal of the denial of the motion for a preliminary injunction and that motion was denied. (A. 2a).

Petitioner appealed the denial of his motion for a preliminary injunction. On July 13, 1970, the United States Court of Appeals for the Seventh Circuit stayed the involuntary order into active duty in the United States Army during the pendency of the appeal. On January 14, 1971, the Court of Appeals affirmed the denial of the motion for a preliminary injunction. (A. 11a).

The pertinent facts are recited in the complaint. At the time of the filing of the complaint, petitioner had been a member of the Illinois Army National Guard for four years; he had never missed a training assembly; he had never missed the annual field training; he had otherwise

[1] "A." refers to the Appendix to this Petition.

obeyed all rules and regulations and assumed all obligations incident to his position in the Illinois Army National Guard. (A. 3a).

Petitioner attended training assemblies on February 14, February 15 and March 14, 1970, wearing his hair in a style currently fashionable. Captain Donald Beedle, Commander of 1st Battalion, 202 D Artillery, the unit of the Illinois Army National Guard of which Petitioner was a member, was dissatisfied with petitioner's appearance and, as a result, petitioner was declared an unsatisfactory participant in more than five training assemblies for a period of one year, and thus he came immediately liable for involuntary active duty in the United States Army. (A. 3a).

On March 30, 1970, petitioner was told that he would be ordered for involuntary active duty into the United States Army because of his unsatisfactory participation in six training assemblies in one year's time. Petitioner appealed through the administrative channels available to him, on the grounds that others in his unit had hair as long as or longer than petitioner's. Petitioner argued that because he was punished and these others were not, he was the victim of unfair and arbitrary treatment, and that his constitutional rights had been violated. Petitioner's appeal, however, was denied and his administrative remedies thus exhausted. (A. 4a).

REASONS FOR GRANTING THE WRIT.

(1)

This Court is being asked to determine an important question of Constitutional law which it has yet to determine, namely: Does the Armed Forces violate the First and Ninth Amendments to the United States Constitution when it regulates the length of hair of a member of the Army National Guard without substantial justification for that regulation?

This Court has expanded the concepts of the First Amendment to include conduct in the penumbras of free speech and association. Freedom of expression as displayed in different types of conduct have been given constitutional protection. As far back as 1931 the use of symbols was protected in *Stromberg* v. *California*, 283 U.S. 359 (1931), and this was based on the idea that communication can be by word or symbol. Other examples of conduct which have enjoyed constitutional protection are: The wearing of beards, *Braxton* v. *Board of Public Instruction of Duval County, Fla.*, 303 F. Supp. 958 (1969); the wearing of buttons, *Leslie Tobin Imports, Inc.* v. *Rizzo*, 305 F. Supp. 1135 (1969); marching on Mayor's house, *Gregory* v. *City of Chicago*, 394 U.S. 111 (1969); contempt of the American flag, *Street* v. *New York*, 394 U.S. 576 (1969); the wearing of arm bands, *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969).

This Court has also recognized that the Ninth Amendment and the penumbras of the rights guaranteed by the other Amendments create a zone of privacy wherein a person has the freedom to act, which the Government can curtail only upon the showing of a substantial justification for the interference. *Griswold* v. *Connecticut*, 381 U.S.

479 (1965). The attempt to regulate the length of petitioner's hair is within the same zone of privacy as the use of contraceptive devices by a married couple.

The force of this concept was brought out for the Seventh Circuit Court of Appeals by Judge Kerner, speaking for the majority in *Breen* v. *Kahl,* 419 F. 2d 1034 (C.A. 7, 1969), where he stated:

> "The right to wear one's hair at any length or in any desired manner is an ingredient of personal freedom protected by the United States Constitution." 419 F. 2d at 1036. See also, *Crews* v. *Cloncs,* 432 F. 2d 1259 (C.A. 7, 1970).

The facts in the *Breen* case dealt with the government's right to regulate the length of hair of young men in school. The facts in this case deal with the government's right to regulate the length of hair of young men in the Illinois Army National Guard. The common principle in both situations is that the government is dealing with young men in a custodial situation. How much the government can infringe on the personal freedom of these young men depends on the amount of justification the government has for taking away that freedom.

Whether it is to be a right of the First Amendment or a right of the Ninth Amendment, the wearing of hair in any style is a personal freedom which has Constitutional protection. If the petitioner chooses to express himself with his hair style, he is protected by the First Amendment. If the petitioner deems his hair style a private matter, he is protected by the Ninth Amendment. In either case, if the government is going to infringe on petitioner's right, it must have a substantial justification to do so.

Nowhere has the government made any attempt to justify its position that Army Regulation 135-91-5d(2) and 600-20 are valid infringements on petitioner's Constitutional freedom to wear his hair as he pleases. Petitioner is not aware of any such justification. Unless and until the government can demonstrate its justification for infringing on petitioner's personal freedom, it must refrain from so doing.

A cursory review of the military history of the United States reveals that the Armed Forces have been ably led by men with long flowing hair. Apparently, the Armies engaged in the Civil War and in the frontier wars thereafter did not find it necessary to require that the soldiers have short hair. In light of that history, it is difficult to understand what justification, if any, the present Armed Forces has to require petitioner to have short hair.

The Court of Appeals below did not follow its own decisions in *Breen* and *Crews,* because it felt that the military was exempt from the constitutional requirement that there be a substantial justification for the interference with the personal freedom of the Petitioner.. (A. 5a). It assumed that the military was exempt without giving any reasons for such exemption. Petitioner sees no reason for a distinction between the military and the civil government in this regard. Certainly, the Armed Forces could not require that every man in the military must have green hair and then argue that such a requirement could not be attacked on constitutional grounds, because the Armed Forces did not have to demonstrate a substantial justification for such a requirement.

The Court of Appeals also appears to argue that this regulation of hair length must be upheld as a matter of enforcing the right of the Armed Forces to set standards

of discipline. (A. 5a). This argument assumes the validity of the requirement in question. There is no doubt that the Armed Forces can compel adherence to regulations which are valid apart from the necessity to adhere to them. However, such argument does not establish the validity of the regulation. An unconstitutional requirement is not made constitutional by arguing that military discipline requires that it be followed. Such a position is analogous to the argument that an unconstitutional law is made constitutional by the necessity of having respect for law and order.

The reliance of the Court of Appeals on the decisions in other circuits is not persuasive, because an examination of these cases reveals that they did not deal with the question of whether or not Army Regulations 135-91-5d(2) and 600-20 violate the First and Ninth Amendments. (A. 6a). Further, the reliance of the Court of Appeals on *Burns* v. *Wilson,* 346 U.S. 137 (1953) and *Orloff* v. *Willoughby,* 345 U.S. 83 (1953) is not persuasive. In *Burns,* this Court refused to interfere with decisions in the Military Courts, where an examination of the proceedings in those courts demonstrated that persons convicted by those proceedings were dealt with fairly. In *Orloff,* this Court declined to interfere with a duty assignment given to a doctor in the military. Neither of these cases involved a challenge to the constitutionality of military regulations interfering with personal freedom.

On this question, Petitioner urges that this Court rather follow the partial dissent of District Court Judge Reynolds:

> "The majority assumes the legitimacy and necessity of the requirements at issue merely because the appellant has 'voluntarily' associated himself with the mili-

> tary. Whether it is correct to typify the appellant's joining the national guard as 'voluntary' aside, the majority appears to me to absolve the military of any burden of justification with regard to the abrogation of appellant's constitutional rights. The military has such a burden."

The military has not met that burden in this cause.

Petitioner requests that this Court follow the position enunciated in *Bates* v. *Little Rock*, 361 U.S. 516, at 524 (1960):

> "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."

Accordingly, Petitioner respectfully submits that this Court should issue its Writ of Certiorari in order that it may decide this important question of Constitutional law.

(2)

The conduct required of a member of the Army National Guard, in regard to his hair style, is set out in Army Regulations 135-91-5d(2) and 600-20. 135-91-5d (2) states that a Guardsman must present a neat and soldierly appearance; this is defined in the regulation as an appearance satisfactory to his commanding officer. 600-20, as in effect when Petitioner was subject to its terms, defined the standard of neat and soldierly. However, 600-20 goes further and states that the hair will be well groomed, cut short or medium length, and neatly trimmed at all times. Once again, what this means is left to the discretion of the commanding officer. (A. 12a). There is no reference as to which of these regu-

lations controls the other one and neither of these regulations defines neat and soldierly.

The vagueness and uncertainty of 600-20 is demonstrated by its successive modifications. In April of 1968, 600-20(2) read:

> "The hair will be well groomed, cut short or medium length and neatly trimmed at all times."

On November 28, 1969, the wording was:

> "The hair to include sideburns will be well groomed, cut short or medium length and neatly trimmed at all times."

This was the language in effect when Petitioner's appearance was found unsatisfactory.

On May 28, 1970, 600-20(2) read:

> "Hair cuts, without reference to style, will conform to the following standards. The hair on the top of the head will be neatly trimmed but will not be cut to less than one inch unless the individual specifically requests that it be cut shorter. The (maximum) length will not exceed three inches. In all cases the bulk of length of the hair will not interfere with the normal wear of all standard military headgear required in the performance of duty. The sides and back will be trimmed and evenly tapered. The sides and back of the head will not be shaven or excessively clipped, unless specifically requested by the individual. The tapering of the hair will start from a clear line established by shaving the base of the side burn, above and around the ears and the back of the neck."

Again, interpretation is left to the discretion of the commanding officers.

The problem is that the only standard presented, neat and soldierly is vague, as evidenced by the fact that the commanding officer of each unit is left to define what neat and soldierly means. The result of allowing individual commanders to set the standards for "neat and soldierly" is that there is a vast number of different interpretations of neat and soldierly.

To insure that the standard of "neat and soldierly" is met, 10 U.S.C., Sec. 673a(a)(1) provides for involuntary activation into this United States Army for any Guardsman who fails to live up to the standard of "neat and soldierly". This procedure is used as a penalty by the government to force Guardsman to conform to Army Regulations.

The Supreme Court of the United States has consistently held that it is a violation of due process for a person to be convicted and deprived of his liberty pursuant to a statute that is vague and uncertain. In *Musser* v. *Utah*, 333 U.S. 95 (1948) the United States Supreme Court reversed a criminal conviction for a crime against the "public morals" on the grounds that public morals are vague. Lower Federal Courts have followed this position. A state statute made it an offense to "operate a nudist colony" and the conviction, based on that statute, was reversed; in *Roberts* v. *Clement*, 252 F. Supp. 835 (1966) the Court held that "such statutes must be framed so that those to whom they apply may know what standard is to be required." A conviction for a "crime against nature" was reversed in *Perkins* v. *State of North Carolina*, 234 F. Supp. 333 (1964), the Court holding that the law must be clear so that a man cannot be convicted for a vague statute. In reversing a conviction under a "state vagrancy statute" in *Goldman* v. *Knecht*, 295 F. Supp. 897 (1960) the Court laid down the prin-

ciple that precision sufficient to give notice of the proscribed conduct must be presented, so that a man should not have to guess at the meaning of the statute.

The principle involved in the above cases is that due process will not allow a man to be deprived of his liberty for violating a vague and unclear criminal statute. This same principle applies to all other vague regulations, ordinances, or administrative rulings which would deny a man his liberty.

The definition of neat and soldierly is left to the individual commanding officers; what it will mean to one is not necessarily what it will mean to another. The same is true of the other standards in Regulation 600-20, e.g., neatly trimmed, short or medium length, both of which are vague and uncertain.

The same effect would be achieved by allowing individual peace officers to determine what "criminal conduct" is. Due process of law demands that where a man's liberty is at stake, the standards of conduct must be clear, definite and certain. Army Regulation 135-91-5d (2) and Army Regulation 600-20 are not clear, definite or certain. Due process will not allow the Army to take away a man's liberty for failing to live up to these unclear regulations.

The Court of Appeals below took the position that the definition of neat and soldierly was within the discretion of the military and, therefore, beyond review by the civil courts. Further, it stated that Petitioner was personally informed by his commanding officer that his appearance was in violation so that he cannot now assert that he was unaware of what conduct rendered him subject to discipline. (A. 7a). Certainly the observation that setting these standards is within the discretion of

the military does not render the regulations any more specific. Also, the fact that Petitioner's commander informed him that his appearance was in violation in no way cured the vagueness of the regulation in question.

Accordingly, Petitioner respectfully submits that this Court should issue its Writ of Certiorari in order that it may decide this important question of Constitutional law.

CONCLUSION.

For the reasons severally and collectvely assigned here it is respectfully prayed that this Court issue its Writ of Certiorari to review the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

GEORGE C. PONTIKES
11 South LaSalle Street
Suite 3200
Chicago, Illinois 60603

APPENDIX 1

Opinion of the United States Court of Appeals.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1970 SEPTEMBER SESSION, 1970

No. 18591

PVT. E2 DONALD JACK ANDERSON NG26382581,
Plaintiff-Appellant,

v.

MELVIN LAIRD, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 14, 1971

Before HASTINGS, *Senior Circuit Judge,* PELL, *Circuit Judge* and REYNOLDS, *District Judge.*[1]

PELL, *Circuit Judge.* This is one of an apparently growing class of cases involving the claim of interference with constitutional rights, usually multiple, arising out of an authoritive discouragement or outright prohibition of the manner and style in which one would adorn himself whether by raiment or natural exfoliation.

[1] Judge John W. Reynolds is sitting by designation from the United States District Court for the Eastern District of Wisconsin.

In the present case the plaintiff, Donald Jack Anderson, is appealing from an order of the United States District Court for the Northern District of Illinois which denied his motion for a preliminary injunction which would have enjoined Anderson's induction into the United States Army pending the determination of the issues raised in his complaint.

Prior to the events giving rise to his complaint, Anderson was a member of the Illinois Army National Guard. As such, he was a member of the Ready Reserve of the United States Army. 10 U.S.C. § 269(b).[2] The issues presented by his complaint deal generally with his right to wear his hair "in a style currently fashionable"[3] without interference or adverse action against him by his superiors in the Guard.

Section 673a(a)(1) of Title 10, United States Code, authorizes the President to order to active duty any member of the Ready Reserve who is "not * * * participating satisfactorily" in his reserve duties.[4] Such authority has been delegated by the President to the

---

[2] Section 269(b), Title 10 U.S.C. provides:

"(b) The units and members of the Army National Guard of the United States and of the Air National Guard of the United States are in the Ready Reserve of the Army and the Ready Reserve of the Air Force, respectively."

[3] The complaint is no more explicit than the reference to "a style currently fashionable" and there was no evidentiary hearing on the motion for preliminary injunction but merely an argument on the law. We feel, however, we may safely assume the currently fashionable reference was to a luxuriant growth of hair.

[4] "§ 673a. Ready Reserve: members not assigned to, or participating satisfactorily in, units

(a) Notwithstanding any other provision of law, the President may order to active duty any member of the Ready Reserve of an armed force who—

(1) is not assigned to, or participating satisfactorily in, a unit of the Ready Reserve * * *."

defendant Secretary of Defense and by him to the defendant Secretary of the Army. Exec. Order No. 11366, 3 C.F.R. 312 (Supp. 1967), 10 U.S.C. § 673a.

"Satisfactory participation" is defined in Army Regulation 135-91, dealing specifically with reserve components, and Army Regulation 600-20, dealing with all components. Paragraph 5(d)(2) of AR 135-91 defines satisfactory participation to include "attendance at all scheduled unit training assemblies * * * unless excused." No credit for attendance is given a member physically present "unless he is in the prescribed uniform, presents a neat and soldierly appearance, and performs his assigned duties in a satisfactory manner as determined by the unit commander." "Neat and soldierly appeearance" is further defined by AR 600-20 ¶31(a), as it read when plaintiff was charged with unsatisfactory participation:

> "The hair to include sideburns will be well groomed, cut short or medium length and neatly trimmed at all times."

Anderson's complaint alleges that for four years prior to February, 1970, he had attended all meetings, obeyed all rules and assumed all obligations of his position as a member of the Illinois Army National Guard. On three separate occasions during February and March 1970, he attended training assemblied while wearing his hair "in a style currently fashionable." His unit commander informed him, apparently on each occasion, that his hairstyle violated the regulation. He was declared an unsatisfactory participant. Such declaration caused him to have more than five unsatisfactory attendances in one year[5] and thus made him liable to be ordered to active duty in the Regular Army pursuant to 10 U.S.C. §673a, *supra*.

---

[5] The actual count of unsatisfactory attendances was apparently six. We have no explanation of the nature of the three unsatisfactory attendances other than those attributable to the haircut but we assume they had no relation to that particular factor.

On March 30, 1970, plaintiff was informed by the defendant Adjutant General of the Illinois Army National Guard that he would be ordered to active duty and that he could file an appeal. Plaintiff did appeal, claiming that others in his unit had hairstyles similar to his but were not reprimanded in any way. His appeal was denied on July 1, 1970, and Anderson was ordered to active duty commencing July 11, 1970.

This action was filed on July 10, 1970. It seeks orders in the nature of mandamus directing the defendant officers of the Illinois Army National Guard to reinstate plaintiff in the Guard and enjoining the other defendants from ordering Anderson to active duty in the Regular Army.

The district court denied the request for a preliminary injunction on July 10. It is from this denial alone that Anderson now appeals.

The scope of our review of the denial of a temporary injunction is limited. "[I]t is well established that the issuance of a temporary injunction rests in the sound discretion of the trial court. On appeal, an order granting or denying such an injunction will not be disturbed unless there is a clear showing of an abuse of the discretion so exercised." *Progress Development Corp.* v. *Mitchell*, 286 F. 2d 222, 229 (7th Cir. 1961). Discretion is abused only where no reasonable man would take the view adopted by the trial court. *Particle Data Labaratories, Inc.* v. *Coulter Electronics, Inc.*, 420 F. 2d 1174, 1178 (7th Cir. 1969).

Among the several factors to be weighed by a district court in granting or denying a preliminary injunction is the probability that plaintiff will ultimately prevail on the merits. *Tele-Controls, Inc.* v. *Ford Industries, Inc.*, 388 F. 2d 48, 50 (7th Cir. 1967).

On the basis of applicable law and the facts as they appear before us, we are not persuaded that there is any reasonable probability of plaintiff's ultimate success in his litigation.

Anderson challenges the action taken against him by the Army and the National Guard on three grounds. He first asserts that he has a right under the First and Ninth Amendments to wear his hair as he wishes and that such right may not be infringed by the government absent "substantial justification." *See Breen* v. *Kahl,* 419 F. 2d 1036 (7th Cir. 1969). If Anderson were completely in civilian status, his position would have legally persuasive stature.

However, "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty." *Burns* v. *Wilson,* 346 U.S. 137, 140 (1953). It cannot be seriously disputed that certain constitutional rights are and must be suspended or curtailed in the name of military discipline. *Raderman* v. *Kaine,* 411 F. 2d 1102, 1104 (2d Cir. 1969), *cert. den.* 396 U.S. 976.

And, in matters properly within the area of military discretion, it is not for civil courts to judge whether the military has properly determined the balance between military needs and personal rights. *See Burns, supra,* 346 U.S. at 140.

In *Orloff* v. *Willoughby,* 345 U.S. 83, 93-94 (1953), the Court dealt with military duty assignments and said:

> "We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."

Anderson does not raise on this appeal, and, as far as we can tell, did not raise at the hearing below, the possible question of whether any different treatment should be accorded the reservist or Guard soldier inasmuch as a substantial portion of his time is spent in civilian pursuits rather than military. While we perhaps therefore are not compelled to consider this matter, it is our opinion that no different treatment should be accorded the part-time soldier. He has undertaken a type of military duty on a voluntary basis and cannot be heard to complain if the legitimate requirements of necessity do curtail to some extent the manner of his appearance in civilian life.

The Army apparently remains singularly unimpressed by the strength Samson found in flowing locks. While presumably still concerned with physical capabilities on the part of soldiers, the Army also has expressed regulatory interest in the appearance of its personnel. While a neat and tidy appearance by standards somewhat more conservative than those adopted by the Beatles may avail little in jungle guerrilla warfare, we are not prepared to say that the Army's concern for appearance generally is not one of legitimacy and subject to Army determination.

Thus we can find no justification warranting our interference with the discretionary decision of the military to impose certain standards of appearance to govern its members. We note that other courts have recently reached a like conclusion in cases substantially similar to the instant one. *Gianatasio* v. *Whyte,* 426 F. 2d 908 (2d Cir. 1970), *cert. den.* 39 L.W. 3242 (12/7/70), *Byrne* v. *Resor,* 412 F. 2d 774, 775 (3d Cir. 1969), *Raderman* v. *Kaine, supra,* 411 F. 2d at 1105, and *Smith* v. *Resor,* 406 F. 2d 141, 145 (2d Cir. 1969) and cases cited therein.

In addition to his First and Ninth Amendments argument, Anderson asserts that AR 135-91 and AR 600-20 are so vague and uncertain as to amount to a denial of due process of law. He finds particularly offensive the use of the standard "neat and soldierly" and the delegation of the ultimate definition of the standard to individual unit

commanders. Anderson asserts that such a standard lacks sufficient precision to inform those subject to it of what conduct on their part will violate it.

By this standard the military has sought to grant unit commanders discretion in dealing with the appearance of the men under their command. This, as we have already indicated, is the sort of discretion that is beyond the review of civil courts.

Furthermore, the record discloses that the unit commander exercised this discretion and set the definition of "neat and soldierly" by personally informing plaintiff that his appearance did not conform to the standard. Anderson cannot now assert that he was unaware of the particular conduct that rendered him subject to discipline. He nevertheless persisted in such conduct until he had accumulated enough unsatisfactory marks to make him liable for activation into the Regular Army.

Finally, Anderson asserts that his right to equal protection implicit in the Fifth Amendment, *Bolling* v. *Sharpe*, 347 U.S. 497 (1954), has been violated. He asserts that other men in his unit had a hairstyle similar to his and were not reprimanded in any way. We need not reach the question of whether this would constitute a legally sufficient ground for relief. It appears from the record that Anderson has prosecuted a military appeal on this same ground and failed. From this, the district court could properly conclude that there is no more than a slight probability of plaintiff's being able to prove facts to sustain the unsupported allegation of his complaint.

We find the probability of plaintiff's ultimate success on the merits so minimal we are unable to say that the district court has clearly abused its discretion in denying a preliminary injunction pending trial. We therefore affirm.

AFFIRMED.

REYNOLDS, *J.*, concurring in part, dissenting in part.

I concur in the result because this case involved the appeal from a denial of temporary injunction. There is a virtually unanimous body of judicial opinions refusing to intervene in the punitive activation of "civilian-soldiers" for having long hair. See cases at page 6 herein. Hence, although the equities appear to be heavily in appellant's favor and it is a convincing case of immediate, irreparable harm, nonetheless, in light of the case law, the trial judge was justified in concluding that the appellant's chances of ultimate success on the merits were slim indeed.

In spite of the fact that the majority opinion, holding, in effect, that a civilian-soldier may be ordered into active duty because he has long hair, is backed by considerable legal authority, I must, nevertheless, most respectfully take exception with that portion of the opinion which deals with appellant's First and Ninth Amendment rights.

The right to wear one's hair in any style one desires is "an ingredient of personal freedom protected by the United States Constitution," *Breen* v. *Kahl,* 419 F.2d 1034, 1036 (7th Cir. 1969), and "[t]o limit or curtail this or any other fundamental right, the state has a 'substantial burden of justification.'" *Breen* v. *Kahl, supra,* at 1036. The state should be held to this burden of justification even where the military is involved. In a recent selective service case, the Supreme Court stated:

> "* * * a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; *and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.* * * *" *United States* v. *O'Brien,* 391 U.S. 367, 377 (1968). (Emphasis supplied.)

Under the Ninth Amendment, the Government, including the military, has no right to unnecessarily interfere with the private lives of citizens, whether they be in the military or not.

The majority opinion herein implies that the appellant's assertion of his constitutional rights and his right to enjoy them absent substantial justification would be persuasive only if he were "completely in civilian status." One does not lose the right to constitutionally-protected freedoms absent substantial justification even in the military. A soldier may lose certain liberties, otherwise constitutionally protected, when serving in the military. *Raderman* v. *Kaine,* 411 F.2d 1102 (2d Cir. 1969), *cert. denied* 396 U.S. 976. The loss of these rights while in military service is presumably attended in each instance by "substantial justifications" inherent in the nature of military duty.

After noting that appellant apparently failed to raise, either below or on this appeal, the issue of whether differing treatment should be accorded a reservist, as opposed to an active duty soldier, the majority opinion states categorically that "no differing treatment should be accorded the part-time soldier" because the appellant has undertaken this form of military duty "voluntarily" and "cannot be heard to complain if the legitimate requirements of necessity do curtail to some extent the manner of his appearance in civilian life." I must respectfully disagree. The majority assumes the legitimacy and necessity of the requirements at issue merely because the appellant has "voluntarily" associated himself with the military. Whether it is correct to typify the appellant's joining the national guard as "voluntary" aside, the majority appears to me to absolve the military of any burden of justification with regard to the abrogation of appellant's constitutional rights. The military has such a burden. Furthermore, the civilian-soldier status should be taken into account because the constitutional rights that circumstances may require an active duty soldier to give up to complete his mission efficiently and successfully may not be necessary for a civilian soldier to

give up to complete his mission efficiently and successfully. I can think of many real examples but will cite just one. In Wisconsin, we have members of the national guard who are leaders in both of our political parties and take a very active role in politics. If they were on active duty, this would not be permitted by the military. I think it could be argued that while on active duty, they forego their constitutional rights in that area. But no one would seriously argue that as civilian-soldiers in the national guard they have to give up such rights.

A civilian-soldier is neither a civilian nor a soldier. He stands somewhere in between. Accordingly, it is not axiomatic that because a soldier on active duty surrenders certain liberties, a civilian-soldier in the national guard also surrenders the same liberties to the same degree merely because both are somehow connected with the military. I am concerned that the majority opinion appears to hold that because the appellant is not "completely civilian" he is, therefore, to be treated as though he were completely military and that nothing more need be shown to justify an interference with his private life by a reserve commander.

The military has not met its burden to justify its interference with the private life of this particular type of "soldier." I do not say that they could not ever meet the burden. However, I am presently unconvinced that short hair in the national guard is sufficiently important to the orderly administration of our armed forces to warrant the punitive activation of a guardsman who asserts the right to determine the length of his own hair.

APPENDIX 2

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 18591 SEPTEMBER TERM, 1970

Pvt. E2 Donald Jack Anderson
NG 26382581,
Plaintiff-Appellant,

vs.

Melvin Laird, et al,
Defendants-Appellees.

JUDGMENT ORDER

ON CONSIDERATION WHEREOF, it is ordered and adjudged that the order of the said District Court in this cause appealed from be, and the same is hereby, affirmed with costs, in accordance with the opinion of this Court filed this day.

January 14, 1971.

A true copy.
Attest: Kenneth Carrick,
Clerk, U.S. Court of Appeals, 7th Circuit

APPENDIX 3

ARMY REGULATIONS.

Army Regulation 135-91-5(d)(2) recites in pertinent part as follows:

> "d. Satisfactory participation is defined as follows:
> . . .
> (2) Attendance at all scheduled unit training assemblies as a member of a paid drill unit of the Army National Guard or Army Reserve, unless excused by proper authority as provided herein. A member present at a scheduled unit training assembly will not receive credit for attendance thereat unless he is in the prescribed uniform, presents a neat and soldierly appearance, and performs his assigned duties in a satisfactory manner as determined by the unit commander . . ."

Army Regulation 600-20, paragraph 31a(2), as amended April 1968, recites in pertinent part as follows:

> "(2) The hair will be well groomed, cut short or medium length and neatly trimmed at all times. The face will be clean shaven, with the exception that wearing a neatly trimmed mustache is permitted."

Army Regulation 600-20, paragraph 31a(2), as amended November 28, 1969, recites in pertinent part as follows:

> "(2) The hair to include sideburns will be well groomed, cut short or medium length and neatly trimmed at all times. The face will be clean shaven, with the exception that wearing a neatly trimmed mustache is permitted."